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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RUSSELL E. REXRODE, Defendant and Appellant.	A122435 (Mendocino County Super. Ct. No. SCTMCRCR05-68070)

I. INTRODUCTION

Russell E. Rexrode (Rexrode) was convicted of cultivation of marijuana and unlawful possession of a mountain lion. He maintains the trial court erred in denying his motion to quash or traverse the search warrant issued for his home and to suppress the evidence found there. We affirm.

II. PROCEDURAL BACKGROUND

The Mendocino County District Attorney charged Rexrode with cultivation of marijuana (Health & Saf. Code, § 11358), possession of marijuana for sale (Health & Saf. Code, § 11359), possession of the carcass of a nongame bird (Fish & Game Code, § 3801.6) and possession of a mountain lion (Fish & Game Code, § 4800, subd. (b)). Following a jury trial, Rexrode was convicted of cultivating marijuana and possession of a mountain lion. The court suspended imposition of sentence, and placed him on probation for 36 months subject to certain conditions, including serving a term of 180 days in the county jail. This timely appeal followed.

III. FACTUAL BACKGROUND

We set forth only those facts pertinent to the issues raised on appeal regarding the search warrant for Rexrode's residence and property. Lynette Shimek, a game warden with the California Department of Fish and Game, executed the affidavit of probable cause in support of the warrant. Shimek attested to the following:

She had been a warden for 16 years in Lake County after graduating from the Fish and Game Academy, and had investigated over 400 cases of fish and game violations involving big game animals and "thousands" of violations involving fish, birds or other wildlife. Based on her training and experience, she was aware "there is an illegal practice of wildlife being captured and possessed for dog training. These wildlife species are commonly raccoons, fox, bear, and mountain lion. I am also aware that people who engage in this activity will capture and possess more than one species of wildlife. I know that when people use wildlife to unlawfully train hunting dogs with, the wildlife animals are often kept in filthy, inhumane, inadequate cages, without food, water, cover or shelter. These animals are commonly penned, chained, or released during training in order for the dogs to chase, maim and kill."

On October 11, 2005, she received information from an informant previously known to her and identified in the affidavit as "Y." Y told Shimek an unknown person had captured three mountain lion kittens. An individual identified as "X," who was not known to Shimek, had relayed this information to Y.

The following day Shimek spoke with X, who told her a man named "Russell" from Fort Bragg had a mountain lion kitten. X had been at a residence where two mountain lion kittens were being kept. Russell "took at least one of the mountain lion kittens," which were "thin, sickly" and less than 10 pounds in weight. X overheard Russell tell someone he planned to tame the mountain lion and "use it to train his dogs." X also stated Russell "is currently involved in or has in the past been involved in the illicit possession and sales of a large amount of marijuana and/or other drugs."

Shimek e-mailed other fish and game wardens in Sonoma, Lake and Mendocino counties, asking for information on any previous contacts with a man named "Russell" who matched the description given by X. She received "several" replies identifying Russell Rexrode as a possible suspect. In particular, Game Warden Pam Robison reported a number of contacts with Rexrode. In December 2000, Robison had received information from a confidential informant that Rexrode and another man were "taking mountain lions in the Camp 1 Ten Mile Road/Little Lake area." The confidential informant told Robison that Rexrode stated he had killed a mountain lion one week before and that Rexrode and his companion had killed two other mountain lions. On December 30, 2000, Robison had encountered Rexrode hunting with hounds and cited him for hunting without a valid license and "failure to return an unused bear tag." Robison also had investigated Rexrode on "two other mountain lion issues." In January 2000, Rexrode unlawfully had removed the toe and claw from both front paws of a lion killed under a depredation permit. He had turned the items over to Robison rather than receive a citation. Robison also had investigated Rexrode for killing another mountain lion in the same area without a depredation permit, but no charges were filed.

Shimek learned from Department of Motor Vehicle records that Rexrode's address was 16311 Old Caspar Railroad Crossing Road, Fort Bragg. On October 13, 2005, she conducted a DMV photo lineup with informant X, who positively identified Rexrode as the individual named "Russell" who had taken at least one mountain lion kitten.

On October 17, 2005, Shimek learned from informant Y that "a mountain lion kitten was being brought into the Mendocino Coast Animal Hospital." Shimek contacted the animal hospital and spoke with an employee who confirmed a man was bringing in a mountain lion kitten. Shimek asked Warden Dennis McKiver to go to the animal hospital. About half an hour later, at 3:30 p.m., McKiver called Shimek and told her he had detained Rexrode in front of the hospital with a mountain lion kitten in a cage. The

kitten was left temporarily at the animal hospital to be evaluated, and Rexrode was detained and released.

Shimek further averred in her affidavit that "[b]ased on my training, experience, and information gathered in this investigation, I believe the items [sought by the search warrant] . . . are evidence of wildlife violations set forth in the California Fish and Game Code, California Code of Regulations, Title 14; and animal cruelty violations set forth in the California Penal Code. . . ." Shimek also declared a "mountain lion of any age, or size, could severely injure or kill a person," and that Rexrode had a young daughter under 10 years of age.

The search warrant for Rexrode's residence and property was signed on October 17, 2005 at 5:05 p.m. Shimek and six other officers began their search of the premises at 6:15 p.m. that day. The officers found a book on raising and hunting mountain lions, a "taming tool," seven photographs of mountain lion hunting, six photographs of dog training with a live raccoon in a cage, two steel-jawed traps with small pieces of hair in the jaws, and two owl legs with talons. They also found about 119 pounds of processed marijuana, 60 marijuana plants, and 35 guns of various types.

Rexrode filed motions to quash and traverse the warrant. The trial court denied the motion to quash, finding probable cause on the face of the warrant affidavit regarding felony animal cruelty.

The court then held a *Franks*[1] hearing on the motion to traverse. Shimek testified informant Y was Cathy Ortiz, the operator of Willits Wildlife Rehabilitation and who had been a reliable, credible witness in the past. Ortiz told Shimek that Shirley McDowell, informant X, had brought a mountain lion kitten to her. Ortiz described the kitten as being malnourished, dehydrated and afflicted with internal parasites. Ortiz believed

[1] *Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*).

McDowell had done the right thing by bringing the mountain lion to her, and she had not wanted to get McDowell in trouble.

Shimek then contacted McDowell. McDowell reported that she had been at a residence later identified as Tony Pardini's with Rexrode, and Pardini had given each of them a mountain lion kitten. McDowell said "[s]he was certain [Rexrode] had one kitten." McDowell also told Shimek she was afraid of retaliation from the individuals who had the mountain lion kittens. (Shimek indicated in police reports she prepared about 10 days later that McDowell was also afraid of being prosecuted for possessing one of the mountain lion kittens, but Shimek did not include this information in her affidavit in support of the warrant.) In a subsequent conversation before Shimek executed the affidavit, McDowell also told her "the third kitten may be over on Fish Rock Road, or . . . at Monte Hulbert's, or . . . Russell Rexrode may have it."[2]

After Rexrode was detained with the mountain lion kitten at the veterinarian's office, Shimek wanted the veterinarian to examine the kitten. The veterinarian initially had agreed, but changed her mind after law enforcement officials congregated outside her office. The veterinarian agreed to do a visual examination of the kitten without removing it from the cage to determine if it was safe to transport, which she did. (Shimek also did not include this information in her affidavit because she did not have it prior to obtaining the search warrant.)

The trial court concluded Shimek had not deliberately or recklessly omitted any material fact from, or made any misstatement in, her affidavit. The court further concluded that even if the omitted material had been included in the affidavit and the purported misstatement excised, it would not have changed the probable cause determination.

[2] On October 22, 2005, five days after the search, Pardini turned over the body of the third mountain lion kitten to Shimek.

Rexrode then moved to set aside the information under Penal Code section 995[3] on the grounds the magistrate erred in denying the motion to quash and suppress. The trial court denied the motion, stating "[i]t's a close call; but as judges are prone to do and based upon what I've read and the prior decisions, I'm going to affirm the judgment of the magistrate and deny the 995 motion."

IV. DISCUSSION

A. Denial of Motion to Quash Search Warrant

Rexrode first argues Shimek's affidavit on its face failed to establish probable cause for issuance of a search warrant, and the trial court therefore erred in denying his motion to quash the warrant.

" 'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " (*Illinois v. Gates* (1983) 462 U.S. 213, 231 (*Gates*), quoting *Brinegar v. United States* (1949) 338 U.S. 160, 175.) "A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' [Citation.] 'A grudging or negative attitude by reviewing courts toward warrants' [citation], is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant[.] '[C]ourts should not invalidate . . . warrant[s] by interpreting . . . affidavit[s] in a hypertechnical, rather than a commonsense, manner.' " (*Gates*, at p. 236, quoting *United States v. Ventresca* (1965) 380 U.S. 102, 109.) "Stated another way, the issuing magistrate's task is to make a practical and commonsense determination whether, given all the information in the affidavit, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.' " (*People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1015, quoting *Gates*, at p. 238.) Our determination on appeal "is

[3] All further statutory references are to the Penal Code.

not based upon a de novo review." (*People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1784.) The "traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." (*Gates*, at p. 236, quoting *Jones v. United States* (1960) 362 U.S. 257, 271, overruled on another ground in *United States v. Salvucci* (1980) 448 U.S. 83, 95.)

The Attorney General maintains the warrant affidavit established probable cause to search for evidence of three felonies: animal cruelty, child endangerment and conspiracy. Rexrode disagrees and also claims the search warrant could not issue to obtain evidence of possession of the mountain lion under section 1524, because any violation of that code section was a "completed misdemeanor" and there is no statutory authorization for issuance of a warrant to search for evidence of a misdemeanor.

Section 1524 establishes the grounds on which a search warrant may issue. These include: "(2) When the property or things were used as the means of committing a felony. [¶] (3) When the property or things are in the possession of any person with the intent to use them as a means of committing a public offense . . . . [¶] (4) When the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony." (§ 1524, subd. (a)(2)-(4).)

Rexrode's focus on the misdemeanor possession charge ignores that Shimek also was investigating felony animal cruelty based on the information she received of Rexrode's plan and intent to use the mountain lion kitten to train hunting dogs. Her affidavit stated McDowell had told her Rexrode said he planned to "tame" the mountain lion kitten to use it to train his hunting dogs. It also stated another game warden, Pam Robison, had informed Shimek she had investigated Rexrode for hunting mountain lions in the past, she had information he had killed mountain lions, both with and without a

"depredation" permit, he had unlawfully taken a mountain lion claw from a legally killed lion, he hunted with dogs, and he had been cited for hunting without a license. Finally, Shimek declared, based on her training and experience, "when people use wildlife to unlawfully train hunting dogs with . . . [t]hese animals are commonly penned, chained, or released during training in order for the dogs to chase, maim and kill." Shimek therefore sought evidence of such animal cruelty, including: "Mountain lions, living or dead, including paws, claws, teeth, meat, hair, blood and other parts thereof. [¶] [a]ny evidence of illegally taken, possessed or commercialized wildlife and/or parts thereof. [¶] [c]ontainers, cages, or compartments used to store hold contain or preserve living or dead wildlife, or parts thereof. [¶] [p]hotographs and/or videos depicting live or dead wildlife and or hunting activity; including photographs and videos depicting dog training and hunting with dogs. [¶] . . . [¶] [t]raps, snares, live traps, catch poles, heavy gloves, or other items used to handle, capture, kill or contain wildlife."

Rexrode contends Shimek's affidavit was "woefully short of setting forth facts establishing a fair probability that [he] was guilty of animal cruelty," asserting felony animal cruelty involves only killing, maiming, torturing or wounding an animal. However, a violation of section 597 is not so limited and includes "subject[ing] any animal to needless suffering . . . or in any manner abus[ing] any animal. . . ." (§ 597, subd. (b).) Further, Shimek's affidavit recites that "training" hunting dogs with illegally captured wildlife commonly means these animals are "kept in filthy, inhumane, inadequate cages, without food, water, cover or shelter" and are "penned, chained, or released during training in order for the dogs to chase, maim and kill." This constitutes felony animal cruelty even under Rexrode's limited definition of the term.

The trial court had ample basis for concluding Shimek's affidavit demonstrated a fair probability, at the very least, that Rexrode was in the possession of property or things he intended to use as a means of committing a public offense. (§ 1524, subd. (a)(3).)[4]

B. The *Franks* Hearing and Motion to Suppress

Rexrode next argues Shimek's affidavit contained two material omissions and a misstatement, and the trial court therefore erred in not suppressing the evidence found at his residence.

Under *Franks, supra*, 438 U.S. 154, a defendant has a limited right to challenge the veracity of statements made in an affidavit in support of a search warrant. "When presented with such a challenge, the lower court must conduct an evidentiary hearing *if* a defendant makes a substantial showing that (1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth, and (2) the affidavit's remaining contents, after the false statements are excised, are insufficient to support a finding of probable cause." (*People v. Panah* (2005) 35 Cal.4th 395, 456 (*Panah*), citing *Franks*, at pp. 155-156.)

The defendant first "must establish the statements are false or reckless by a preponderance of the evidence." (*Panah, supra*, 35 Cal.4th at p. 456, citing *Franks, supra*, 438 U.S. at pp. 155-156; *People v. Bradford* (1997) 15 Cal.4th 1229, 1297.) "It is not enough to simply show a discrepancy between the actual facts and the facts given in the affidavit." (*People v. Costello* (1988) 204 Cal.App.3d 431, 442.) "Innocent or negligent misrepresentations will not defeat a warrant." (*Panah*, at p. 456; *Franks*, at pp. 154-155.) Even if the court finds an intentional or reckless misrepresentation or omission, the defendant secondly " 'bears the burden of showing that the omissions were

[4] Because we conclude the warrant affidavit demonstrated probable cause in regard to felony animal cruelty, we do not address whether the affidavit also established probable cause regarding felony child endangerment or conspiracy.

material to the determination of probable cause.' " (*Panah*, at p. 456, quoting *People v. Bradford*, *supra*, 15 Cal.4th at p. 1297.)

We will uphold a trial court's finding as to the falsity or recklessness of an affidavit statement if supported by substantial evidence. (*People v. Costello, supra*, 204 Cal.App.3d at p. 441.) As for the second part of the test, the "materiality of affirmative misrepresentation[s] and omissions[,] is a question of law." (*Wood v. Emmerson* (2007) 155 Cal.App.4th 1506, 1524.)

Rexrode claims Shimek intentionally or recklessly omitted the following two facts from her affidavit: (1) McDowell (informant Y) had taken one of the mountain lion kittens (which she turned over to Ortiz (informant X) at Willits Wildlife Rescue) and (2) McDowell was concerned she would "get in trouble" for having taken the kitten.[5] He also claims the assertion in the affidavit that he had "at least one" mountain lion kitten was a misstatement because McDowell told Shimek she had taken the "other" kitten.

The trial court found Shimek did not intentionally or recklessly omit or misstate any material fact, and the court's findings are supported by substantial evidence. At the *Franks* hearing, Shimek testified she rushed to complete the warrant affidavit because she had learned Rexrode likely had been alerted law enforcement knew he had a mountain lion. She had planned to have the warrant issued and executed on October 19, 2005. However, at about 2:00 p.m., on October 17, Deputy Scott Nordeen told her he had informed Pardini, Rexrode's friend who had given him the mountain lion, that Fish and Game knew someone in Fort Bragg had a mountain lion kitten. Shimek hurried to finish the affidavit because she was concerned Pardini would tell Rexrode, which he apparently did. Shimek went on to explain the investigation into the capture and possession of the

[5] In the trial court, Rexrode also argued omitting information about the medical condition of the kitten when he was detained outside the veterinary clinic was intentional or reckless. As recited in the facts, Shimek testified at the *Franks* hearing she had no knowledge of the kitten's medical condition when she executed the warrant affidavit, and Rexrode does not pursue that argument on appeal.

mountain lion kittens was the most extensive she had ever conducted and involved about 20 witnesses. Shimek testified "[i]t was an accident . . . mere accidental omission" she did not mention that McDowell feared being prosecuted for possessing one of the kittens.

As for the alleged misstatement, while McDowell told Shimek that Pardini had given one mountain lion kitten to Rexrode and one to McDowell, she also told Shimek she had heard three kittens had been captured and "the third kitten may be over on Fish Rock Road, or . . . at Monte Hulbert's, or . . . Russell Rexrode may have it." Accordingly, the statement in the affidavit that Rexrode had "at least one" mountain lion was not a misstatement.

Rexrode attacks McDowell's statements as "inherently suspect" because she was involved in the illegal possession of the mountain lion kittens and so was not a reliable citizen informant. Considered in context and in light of all the other information Shimek gathered, the trial court had ample basis to credit Shimek's reliance on the information provided by McDowell. That McDowell had one of the mountain lion kittens did not make her an unreliable informant. Pardini gave McDowell the mountain lion kitten at the same time and place he gave one to Rexrode. This established McDowell's personal knowledge that Rexrode possessed a mountain lion. Much of McDowell's information also was corroborated *before* Shimek finalized her affidavit—when Rexrode was detained with the mountain lion kitten on October 17—and Shimek included that corroboration in her affidavit. Finally, there was no evidence McDowell was promised anything in exchange for providing the information. In short, there is no evidence McDowell provided Shimek anything other than credible information.

Even if the two omissions about McDowell are considered, and the purported misstatement is excised, Shimek's affidavit still is sufficient to support a finding of probable cause. (*Franks, supra*, 483 U.S. at pp. 155-156.) Shimek recited an ample factual basis to support a fair probability items would be found on Rexrode's property "tend[ing] to show a felony [was] committed" or that he possessed with the intent of

committing a public offense. (§ 1524, subds. (a)(3)-(4); *People v. Hochanadel*, *supra*, 176 Cal.App.4th at p. 1015; *Williams v. Justice Court* (1964) 230 Cal.App.2d 87, 93-94.) Accordingly, the trial court properly denied Rexrode's motion to traverse the warrant and suppress the evidence found during the search.

V. DISPOSITION

The judgment is affirmed.

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Banke, J.

We concur:

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Marchiano, P. J.

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Dondero, J.